United Nations A/HRC/WGAD/2018/39

General Assembly

Distr.: General
22 June 2018

Original: English

Human Rights Council
Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 39/2018 concerning Abdu Ahmed Abdel Salam (Libya)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 8 February 2018 the Working Group transmitted to the Government of National Accord a communication concerning Abdu Ahmed Abdel Salam. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Mr. Abdel Salam is a Syrian national born in 1982. He and his family live permanently in Libya where they have a permanent residence status and a work permit. Mr. Abdel Salam was a shop assistant in a clothing shop in Sabha, Libya.

Context

5. According to the source, the Special Deterrence Force is an armed group that has been nominally integrated into the Libyan Ministry of the Interior. Its main forces are based in Mitiga, Tripoli. The source notes that, even though the Force is formally under the Ministry of the Interior, it is not under the effective control of the Government, retaining an independent chain of command. The Force is commanded by Abbdul Rauf Kara. Force personnel receive government salaries.

6. The source indicates that, after the relapse in the conflict in 2014, a battalion of the Special Deterrence Force was deployed to Sabha as a result of alliances with local forces and armed actors. According to the source, while the Force's central command is aligned with the internationally recognized Government of National Accord and the Presidential Council, the 116th Battalion of the Force in Sabha has reportedly pledged allegiance to the self-styled Libyan National Army, commanded by Khalifa Haftar, while at the same time appearing to retain some links with Tripoli.

7. According to the source, under Libyan law, the Special Deterrence Force, while authorized to conduct initial arrests, cannot lawfully detain any individual beyond 48 hours, after which it is obliged to refer the detainee to the judicial police. The latter is a police force that runs official prisons under the Ministry of Justice. The source recalls that the United Nations-sponsored Libyan Political Agreement of December 2015 provides that all armed groups, including those integrated into the Ministry of the Interior, should hand over their detainees to the judicial police. Reportedly, the Force is known to hold thousands of individuals in prolonged, unlawful imprisonment in its main detention facility at Mitiga, Tripoli.

Arrest and detention

8. According to the source, on 8 September 2016, Mr. Abdel Salam was arrested at his place of work, a clothing shop in Sabha. Initially, his family was unaware of his whereabouts, fearing that he had been abducted. At around 1 a.m., the following night, the family received a telephone call from a member of the 116th Battalion in Shaba, who informed them that Mr. Abdel Salam was in their custody. They were not immediately informed of the reason for the detention.

9. The source indicates that Mr. Abdel Salam has been detained at the 116th Battalion detention facility in an area called Tariq Mintaqa al Jdid. The facility is well known as a place of detention used by the 116th Battalion.

10. According to the source, Mr. Abdel Salam is a devout Muslim. Some perceive him as a conservative or as holding extreme religious views. However, according to the source, he is not a supporter of Islamic State in Iraq and the Levant or similar jihadist organizations. In the view of the source, Mr. Abdel Salam may have expressed his religious views to third parties in private, which may have prompted the third party to denounce him to local armed forces or authorities. The source maintains that Mr. Abdel Salam spent all his time in Sabha working in a clothing shop and, as such, was unlikely to have had the time or opportunity to serve as a member of any armed group.

11. According to the source, neither Mr. Abdel Salam nor his family has been informed by the Special Deterrence Force of the existence of any evidence against him. The source believes that the only evidence against Mr. Abdel Salam is a confession given under torture. Apparently, in their verbal communications with Mr. Abdel Salam's family, officials of the 116th Battalion maintain that he is a follower of the ideology of Islamic State in Iraq and the Levant and a member of a terrorist network.

12. According to the source, Mr. Abdel Salam was able to receive a family visit for the first time about two months after his arrest. Since then, the family has been able to obtain advance permission to visit him on a regular basis, approximately every 14 days. The visits were initially attended by a member of the Special Deterrence Force. At a later stage, when women or the victim's elderly father were visiting, visits were conducted in private, but lasted only between 5 and 10 minutes. Visits by younger male relatives have been overseen by Force personnel, due to the perceived risk of attempts to release the detainee.

13. Reportedly, due to the inadequacy of what is on offer at the detention facility, family members regularly bring food and medicine to Mr. Abdel Salam. Mr. Abdel Salam's health condition has, however, deteriorated since his initial detention; he has lost weight, appears very weak and might be anaemic.

14. Furthermore, the source reports that there are credible allegations that Mr. Abdel Salam has been tortured; methods have included beatings and torture by electrocution and denial of food. The source also submits that Mr. Abdel Salam has given a confession under duress.

15. The source reports that some family members have indicated a severe deterioration in Mr. Abdel Salam's mental health. During a visit in late 2017, Mr. Abdel Salam halted all verbal communication and appeared not to recognize close relatives. His situation has improved slightly and he has resumed verbal communication, but he still appears fragile psychologically.

16. According to the source, Mr. Abdel Salam has not yet had access to a lawyer. Whenever family members have attempted to solicit legal services, local legal professionals have refused to take on the case or even visit Mr. Abdel Salam in his current place of detention, out of fear of the Special Deterrence Force.

17. The source also specifies that, to date, the detainee has not been referred to the judicial authorities or presented with formal criminal charges.

18. Reportedly, at the end of 2017, a staff member assisting the Commander of the 116th Battalion told family members that Mr. Abdel Salam might be transferred to the main base of the Special Deterrence Force in Tripoli. The family was opposed to this, given the distance to Tripoli and the general mistrust of the Force, as it is known that they do not follow orders from the Government. A suggestion that Mr. Abdel Salam be transferred to Benghazi, controlled by the Libyan National Army, was also opposed by the family, for similar reasons. So far, no transfer has taken place.

19. Moreover, the family has repeatedly approached the Mayor of Sabha to plead for the release of Mr. Abdel Salam. According to the source, in mid-2017, the Mayor stated in conversations with the family that the only solution to the situation would be that if released, he would be deported from Libya within 24 hours. In this respect, the source pointed out that Mr. Abdel Salam does not hold a valid Syrian passport. The Mayor also claimed that there was "nothing more he could do", as he was "not in control of the 116th Battalion".

20. The source further indicates that, in May 2017, the United Nations Support Mission in Libya (UNSMIL) contacted the Mayor of Sabha by phone to request further information about the case of Mr. Abdel Salam and to reiterate that he has the right to appear before a court in order to challenge the decision to detain him. The Mayor stated his willingness to raise the issue with the detaining force. This intervention was to no avail. In June 2017, UNSMIL conveyed a letter to the office of the Commander of 116th Battalion in Sabha, Masoud Jeddi, identifying the case of Mr. Abdel Salam and requesting a clarification of his legal status. To date, UNSMIL has not received any response.

21. According to the source, since then, repeated attempts by the family to negotiate a release with officials of the 116th Battalion have been fruitless.

Response from the Government

22. On 8 February 2018, the Working Group transmitted the allegations from the source to the Government under its regular procedure. The Working Group requested the

Government to provide, by 9 April 2018, detailed information about the current situation of Mr. Abdel Salam and any comments on the source's allegations.

23. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

24. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

25. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

26. Before considering the substance of the allegations made by the source, the Working Group takes note of the fact that Mr. Abdel Salam was detained by the Special Deterrence Force and held by its 116th Battalion in Sabha. The Working Group notes that, while this group is integrated into the Libyan Ministry of the Interior, allegedly, it is not, however, under the de facto control and command of the Government of National Accord, which is the only Government recognized by the Security Council (see resolution 2259 (2015)).

27. Nevertheless, the source has argued and the Government has not challenged the allegation that those who conducted the arrests and who control the detention facilities in which Mr. Abdel Salam is held, the 116th Battalion, in fact, receive salaries from the Government through the Ministry of the Interior (see para. 5 above). The Working Group also takes note that, in its recent report on the situation of arbitrary detention in Libya, the Office of the United Nations High Commissioner for Human Rights (OHCHR) states that the Special Deterrence Force receives support, including salaries, uniforms and equipment, from the State, but effectively maintains its own command structures and operates with a significant level of autonomy.[1]

28. In this respect, the Working Group observes that, in his 2017 report on the situation of human rights in Libya, the High Commissioner pointed out that the use of armed groups to carry out State law enforcement functions had compounded the problems of impunity. Since 2012, armed groups have been nominally integrated into various State structures, including the Ministries of Defence, the Interior and Justice, while in practice maintaining their own command and control structure. Under this arrangement, the State continued to pay their salaries, while the armed groups carried out law enforcement functions, such as arrests and running detention centres, with little or no official oversight or control.[2]

29. The High Commissioner recommended that the Government urgently address the proliferation of armed groups, including through disarmament, demobilization and reintegration, and the building of national security forces under the command and control of the State.[3] He further recommended that the Government also address the situation of detainees, whether foreign or Libyan nationals, by ensuring that the State was in control of all detention facilities and that cases were screened with a view to detainees being released or charged and judged in a trial affording all procedural guarantees, in accordance with Libyan law and international standards.[4]

30. In the view of the Working Group, the fact that the Special Deterrence Force members are on the State's official payroll is a significant indicator, which demonstrates a

[1] OHCHR, "Abuse behind bars: arbitrary and unlawful detention in Libya" (Geneva, April 2018), p. 18.

[2] See A/HRC/34/42, para. 64.

[3] Ibid., para. 86 (a).

[4] Ibid., para. 86 (c).

close link between the Government and the Force.[5] Moreover, the Working Group is mindful of the decree issued by the Presidency Council,[6] which, inter alia, authorizes the Force and its 116th Battalion to implement State security policy and to combat organized crime and terrorism on behalf of the Government, including to arrest suspects. This document also makes it clear that the Force and its 116th Battalion are affiliated with the Ministry of the Interior.

31. Article 5 of the articles on responsibility of States for internationally wrongful acts, which represents customary international law, clarifies that the conduct of a person or entity that is not an organ of the State but that is empowered by the law of that State to exercise elements of governmental authority is considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.[7] In the present case, the Special Deterrence Force was clearly mandated by the Government to detain individuals through this decree and therefore, as a very minimum, it should have known of the actions carried out by the Force, it should have taken measures to protect individuals and should have known that such actions would overstep the boundaries of legality.

32. Moreover, the positive obligation of the State to prevent and punish crimes in order to uphold its human rights duties remains intact irrespective of whether the actions of the Special Deterrence Force can be attributed to the Government. The Working Group concludes that, in this case, the Government is responsible for the actions of the Force.

33. The source has submitted the allegation, which was not challenged by the Government, that Mr. Abdel Salam was arrested by the Special Deterrence Force on 8 September 2016 without a warrant, without giving any reasons for his detention at the time of the arrest and without having been informed of any charges since then.

34. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested must be promptly informed of the reasons for the arrest and of any charges brought against him or her. The right to be promptly informed of charges concerns notice of criminal charges and, as the Human Rights Committee has noted in paragraph 29 of its general comment No. 35 (2014) on liberty and security of person, this right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment. In the present case, Mr. Abdel Salam has been in detention for a period of more than 19 months and must still be informed of any formal charges against him. In other words, the authorities have not formally invoked any legal basis justifying his detention. This is a breach of article 9 (2) of the Covenant.

35. Furthermore, in order to establish that detention is legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[8] This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,[9] applies to all situations of deprivation of liberty, including not only to detention for purposes of criminal proceedings but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-

[5] See also opinion No. 6/2017, see also opinions No. 3/2016 and No. 4/2016.

[6] See Decree No. 555 (2018), establishing the Al Radaa Authority, read in the light of a 2011 decree of the National Transitional Council, in which the Special Deterrence Force was converted to armed brigades under the Supreme Security Council and were later placed under the control of the Ministry of the Interior (see resolution No. 191 of 2011 dissolving the Supreme Security Council).

[7] See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, principle 2; see also A/HRC/34/42, para. 22.

[8] See A/HRC/30/37, annex, paras. 2–3.

[9] Ibid., para. 11.

terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[9] Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[11]

36. The Working Group notes that, since his arrest on 8 September 2016, Mr. Abdel Salam has not been presented before any judicial authority that would have been able to proclaim on the legality or otherwise of his detention. He has thus been detained for over 19 months without any possibility to challenge the legality of his detention in breach of article 9 (4) of the Covenant. The Working Group observes that this was a breach of article 9 (3) of the Covenant as the authorities failed to bring Mr. Abdel Salam promptly before a judicial authority for trial or release.

37. Moreover, the Working Group notes that, in order to ensure the effective exercise of this right, the detained persons should have access, from the moment of arrest, to legal assistance of their own choosing as stipulated in the Basic Principles and Guidelines.[12] This was denied to Mr. Abdel Salam, which de facto deprived him of the liberty to exercise his right to challenge the legality of his detention, further denying him his rights under article 9 (4) of the Covenant.

38. In this respect, the Working Group is particularly alarmed to note that the lawyers approached by the family of Mr. Abdel Salam declined to undertake the task due to fears of being themselves detained by the Special Deterrence Force. The Working Group underlines that it is the legal and positive duty of the State to protect everyone on its territory or under its jurisdiction against any human rights violation and to provide remedies whenever a violation occurs. The Working Group recalls in particular that the Basic Principles and Guidelines state that legal counsel should be able to carry out their functions effectively and independently, free from fear of reprisal, interference, intimidation, hindrance or harassment (see A/HRC/30/37, annex, para. 15). The Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers for further consideration.

39. The Working Group concludes that, given that the detention of Mr. Abdel Salam took place without an arrest warrant, that no formal charges have been brought against him since the arrest and that he has been effectively prevented from exercising his right to challenge the legality of detention, his arrest and detention are arbitrary and fall under category I of the Working Group.

40. The Working Group observes that Mr. Abdel Salam has been in detention since 8 September 2016 and no charges have been brought against him, which is a total denial of his rights under article 14 (3) (a) of the Covenant. Furthermore, as already discussed above, Mr. Abdel Salam has been denied any legal assistance and the attempts by his family to ensure that he has a legal counsel have been unsuccessful due to the fear of reprisals of the lawyers approached. The Working Group has already expressed its view that the Libyan authorities must ensure the ability of legal counsels to operate professionally without fear of reprisals. In the context of fair trial rights, this also constitutes a breach of Mr. Abdel Salam's rights under article 14 (3) (d) of the Covenant.

41. The Working Group observes that the family members of Mr. Abdel Salam were not informed of his detention until a day after his arrest; they were prevented from visiting him for about two months and that, since then, the visits have been allowed every 14 days. The failure to allow Mr. Abdel Salam to notify his family of his whereabouts and the failure by the authorities to inform his family of his whereabouts promptly is a violation of principle 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention

[9] Ibid., para. 47 (a).
[11] Ibid., para. 47 (b).
[12] Ibid., principle 9, paras. 12–15.

or imprisonment as is the failure to allow family visits for the first two months of Mr. Abdel Salam's detention.

42. The Working Group is concerned about the allegations of torture and ill-treatment, including for the extraction of confessions, made by the source in relation to Mr. Abdel Salam. Those allegations have not been challenged by the Government. The treatment described reveals a prima facie breach of the absolute prohibition of torture, which is a peremptory norm of international law, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of the Body of Principles (principle 6) and of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) (rule 1). The Working Group therefore refers the present case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for further consideration.

43. Moreover, the Working Group notes that the use of a confession extracted through ill-treatment may also constitute a violation by Libya of its international obligation under article 15 of the Convention against Torture. Furthermore, the Body of Principles specifically prohibits taking undue advantage of the situation of detention to compel confession or incriminating statements (see principle 21).[11] It is also a breach of article 14 (3) (g) of the Covenant.

44. Furthermore, the Working Group observes that Mr. Abdel Salam is a Syrian national. Therefore, Libya must respect the obligations that it undertook when it became a State party to the Vienna Convention on Consular Relations. The Working Group notes that consular assistance or consular protection constitutes an important safeguard for individuals who are arrested and detained in a foreign State to ensure that international standards are being complied with. It provides such detainees, as well as consular officials of the detainee's nationality, with certain consular rights, which include, inter alia, the right to freely communicate with and have access to their detained nationals and to be informed about the arrest without delay.

45. The Working Group considers that the disregard for Mr. Abdel Salam's fair trial rights has been of such gravity as to render his detention arbitrary and to fall under category III.

46. The Working Group is seriously alarmed by the reported deteriorating physical and mental health of Mr. Abdel Salam and reminds the Government of its obligations under international law to preserve his life and well-being. The Working Group refers the present case to the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

47. The Working Group is mindful of the recent report on the situation of arbitrary detention in Libya by OHCHR.[12] The pattern of arbitrary deprivation of liberty documented in that report is very similar to the circumstances in the present case, which is of great concern to the Working Group. The Working Group strongly urges the Government and other stakeholders to urgently implement the recommendations of the High Commissioner as detailed in that report.

Disposition

48. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Abdu Ahmed Abdel Salam, being in contravention of articles 3, 9 and 10 of the Universal Declaration of Human Rights and of articles 9 and 14 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I and III.

49. Consequent upon the opinion rendered, the Working Group requests the Government to take the steps necessary to remedy the situation of Mr. Abdel Salam without delay and bring it into conformity with the standards and principles set forth in the

[11] See also opinions No. 48/2016, No. 3/2017, No. 6/2017 and No. 29/2017.

[12] OHCHR, "Abuse behind bars".

international norms on detention, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

50. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Abdel Salam immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

51. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Abdel Salam, and to take appropriate measures against those responsible for the violation of his rights.

52. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Follow-up procedure

53. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Abdel Salam has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Abdel Salam;

(c) Whether an investigation has been conducted into the violation of Mr. Abdel Salam's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Libya with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

54. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

55. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

56. The Government should disseminate through all available means the present opinion among all stakeholders.

57. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[15]

[*Adopted on 26 April 2018*]

[15] See Human Rights Council resolution 33/30, paras. 3 and 7.